

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

September 5, 2013 at 3:30 p.m.

1.	<u>13-90901</u> -E-12	ANDREW NAPIER	MOTION TO CONFIRM CHAPTER 12
	SAC-9	Scott A. CoBen	PLAN
			7-22-13 [150]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 45 days' notice was provided.

Tentative Ruling: The Motion to Confirm Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Creditors having opposed the Motion, the court will hear the merits of the Motion.

The court's tentative decision is to deny the Motion to Confirm Chapter 12 plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Andrew Napier, Debtor, moves the court for an order confirming his Chapter 12 plan, filed on July 23, 2013. The plan provides for monthly payments of \$8,500.00 for a period of three years.

INTERNAL REVENUE SERVICE'S OPPOSITION

The United States of America, on behalf of its agency, the Internal Revenue Service ("IRS") objects to confirmation of the plan on the grounds that the Debtor has not filed his 2012 income tax return. The failure of the debtor to file the 2012 tax return precludes the IRS from determining the precise amount of its unsecured priority tax claim, which will affect the feasibility of the plan.

DEERE & COMPANY'S OPPOSITION

Creditor Deere & Company ("Creditor") objects to confirmation of the Chapter 12 plan based on Debtor failing to comply with the terms of the Chapter 12 plan, as he has not cured a default on a secured claim. Creditor states the Debtor's payment of \$5,628.00 was returned for insufficient funds. Creditor argues it appears that Debtor will not be able to make all payments under the plan or comply with the plan.

DISCUSSION

While the Debtor testifies in his declaration in support of the Motion to Confirm that he has filed all federal, state and local tax returns, Dckt. 152, it appears that the tax returns for 2012 have not been filed. The IRS cannot determine whether the plan is feasible as it cannot determine the amount of its priority claim.

The Declaration of the Debtor provided in support of the motion consists of a recitation of the Plan terms (how much each creditor is to be paid). Dckt. 152. With respect to how the Debtor will be able to fund the plan, he states that he has temporary work from Gomito Ditching to level farm land. This work is to continue through October 31, 2013, and then resume March 1, 2014 and continue through October 2014. Because the work will stop, the Debtor has not prepared a new budget. The budget presented to the court lists monthly gross income of \$76,000.00, expenses of \$67,280.00, and average monthly income of \$7,720.00. Exhibit A, Dckt. 153.

In his declaration, the Debtor states that Exhibit A is his budget showing \$5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes \$75,000.00 a month in gross income and the \$67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement.

Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.

In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of \$28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of \$83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were \$55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was \$43,057 delinquent in plan payments, with another monthly payment of \$19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.

Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013.

In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make \$7,050 a month payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt. 75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of \$66,000 and monthly non-personal expenses of \$56,880. This resulted in his testimony that his average monthly net income was \$9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was \$34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

Furthermore, Creditor Deere & Company states that it was provided a check that was returned for insufficient funds. This also appears to affect the feasibility of the Debtor's chapter 12 plan.

Based on the foregoing, it does not appear the amended Chapter 12 plan is feasible.

The Plan does not comply with 11 U.S.C. § 1225 and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 12 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Plan is denied and the proposed Chapter 12 Plan is not confirmed.

2. [11-93308](#)-E-11 JOHN-PIERRE MENDOZA
David C. Johnston

APPROVAL OF DISCLOSURE
STATEMENT FILED BY DEBTOR
7-17-13 [[236](#)]

CASE DISMISSED 8/2/13

Final Ruling: The case having previously been dismissed, the Motion is denied as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Disclosure Statement filed By Debtor having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied as moot, the case having already been dismissed.

3. [13-90819](#)-E-11 LEASEMOBILE OF SONORA,
INC.

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
4-30-13 [[1](#)]

Debtor's Atty: David C. Johnston

Notes:

Continued from 6/13/13

U.S. Trustee Report at 341 Meeting filed 6/26/13

[UST-1] Motion of the United States Trustee for Order Designating Debtor a Small Business Debtor filed 7/26/13 [Dckt 32], set for hearing 9/5/13 at 10:30 a.m.

[UST-2] Motion of the United States Trustee for Order Converting Case filed 7/26/13 [Dckt 28], set for hearing 9/5/13 at 10:30 a.m.

4. [11-94224-E-11](#) EDWARD/ROSIE ESMAILI

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
12-12-11 [[1](#)]

Debtors' Atty: David C. Johnston

Notes:

Continued from 6/13/13

Operating Reports filed: 6/14/13 [May, Parts 1-6]; 7/13/13 [June, Parts 1-4]; 8/14/13 [July, Parts 1-5]

[JWC-3] Motion for Allowance and Payment of Administrative Expense Claim filed 6/20/13 [Dckt 262];

[DCJ-4] Debtors' Motion to Value Collateral of Keybank, N.A. [1504 Wild Tree Lane, Turlock, CA] filed 7/3/13 [Dckt 271]; Order granting filed 7/23/13 [Dckt 310]

[DCJ-5] Debtors' Motion to Value Collateral of BBCN Bank fka Nara Bank [1153 Kay Circle, Turlock, CA] filed 7/3/13 [Dckt 275]; Order granting filed 7/23/13 [Dckt 311]

[DCJ-6] Debtors' Motion to Value Collateral of BBCN Bank fka Nara Bank [2281 Aldersgate, Turlock, CA] filed 7/3/13 [Dckt 279]; Order granting filed 7/23/13 [Dckt 312]

[DCJ-7] Debtors' Motion to Value Collateral of Wells Fargo Bank, N.A. [1153 Kay Circle, Turlock, CA] filed 7/3/13 [Dckt 283]; heard 7/18/13 and continued to 9/26/13 at 10:30 a.m.

[DCJ-8] Debtors' Motion to Value Collateral of Wells Fargo, Bank, N.A. [2281 Aldersgate, Turlock, CA] filed 7/3/13 [Dckt 287]; heard 7/18/13 and continued to 9/26/13 at 10:30 a.m.

The Bank of New York Mellon's Status Report and Reservation of Rights Regarding Objections to Approval of Debtors' Disclosure Statement filed 8/7/13 [Dckt 323], heard 8/22/13 at 3:30 p.m.

STATUS CONFERENCE - SEPTEMBER 5, 2013

The court denied the motion to approve the Debtors' in Possession proposed disclosure statement on August 22, 2013. Civil Minutes, Dckt. 332. The Monthly Operating Report for July 2013, provides the following information from the Statement of Cash Receipts and Disbursements:

	July 2013	Case Commencement Through July 2013
Income		

Cash Receipts	\$357,672	\$6,062,702
Expenses (Only significant dollar amount expenses listed)		
Salaries	(\$182,110)	(\$3,463,330)
Contract Labor	\$0	(\$19,120)
Insurance	No Cash Disbursement Listed	No Cash Disbursement Listed
Real Property Rent	(\$2,746)	(\$52,373)
Personal Property Rent	(\$1,694)	(\$26,266)
Employer Payroll Taxes	(\$22,155)	(\$520,118)
Employee Withholding	(\$38,888)	(\$641,482)
Other Taxes	(\$15,101)	(\$27,933)
Other Administrative	(\$10,591)	(\$210,692)
Equipment Repairs	(\$5,063)	(\$46,579)
Fuel	(\$5,943)	(\$125,424)
Supplies	(\$6,767)	(\$187,857)
Professional Fees	(\$2,790)	(\$21,906)
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Total Expenses	(\$321,634)	(\$6,014,482)
Net Profit/(Loss) Before Taxes	\$16,038	\$48,097

The July Monthly Operating Report Balance Sheet provides the following information:

Assets for the Month Ending July 31, 2013	
Cash and Cash Equivalents	\$49,447

Accounts Receivable (\$270,351 A/R of 0-30 days)	\$335,511
Employee Advance	\$1,140
Undeposited	\$645

The July 2013 Monthly Operating Report states that the Debtors in Possession have the following monies in bank accounts:

Rabobank -3560: \$ 3
Rabobank -8493: \$ 1,415
Rabobank -5007: \$54,182
Rabobank -8425: \$ 1,267

5. [12-91736](#)-E-12 ANTONIO GOMES

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
6-20-12 [[1](#)]

Debtors' Atty: Thomas O. Gillis

Notes:

Continued from 8/22/13 to be heard in conjunction with other motions on calendar.

6. [12-91736](#)-E-12 ANTONIO GOMES
MNE-1 Thomas O. Gillis

CONTINUED MOTION TO DISMISS
CASE
1-16-13 [[84](#)]

CONT. FROM 8-22-13, 6-13-13, 4-18-13, 2-21-13

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on January 16, 2013. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

No Tentative Ruling: The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR RULING

On February 21, 2013 the court continued the hearing to be heard in conjunction with the motion to confirm. The court ordered opposition, if any, to be filed and served on or before March 28, 2013 with replies to be filed and served on or before April 4, 2013.

On April 8, 2013 Debtors filed an *ex parte* application to shorten time to file and serve a response to the motion to dismiss. Debtor states that his attorney did not calendar the response deadline and that the need to file a response was not discovered until April 7, 2013. Debtor states that the Trustee does not oppose the late filing of a response. On April 9, 2013 the court granted the motion and ordered Debtor to file and serve opposition by April 12, 2013.

The Chapter 12 Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on November 28, 2012.

However, a review of the docket shows that Debtor has filed an Amended Chapter 12 Plan on February 7, 2013, set for hearing April 18, 2013.

This Chapter 12 case was filed on June 20, 2012. On December 1, 2012, the court denied confirmation of the plan proposed by the Debtor in Possession in this case. The court denied the motion in part because of the Debtor in Possession's failure to comply with the minimum pleading requirements of Federal Rule of Bankruptcy Procedure 9013 (motion must state with particularity the grounds from relief). Civil Minutes, Dckt. 78. The court also denied the Motion because the Debtor in Possession was unable to

provide the court with the minimum necessary testimony in his declaration to support confirmation. Given that the preparation of the declaration is so easy, the court infers that a party should be able to present the best testimony to the extent possible. Failure to include information could well be because the Debtor in Possession is attempting to hide the information or mislead the court. The court also denied confirmation based on the failure to properly provide for the secured claims of Movin' Hay and A.L. Gilbert Company.

Following the December 1, 2012 denial of confirmation, the Debtor in Possession took no action to present a new plan to the court. On January 16, 2012, the Chapter 12 Trustee filed the present motion to dismiss.

At the prior hearing the court noted the Debtor in Possession's failure to timely prosecute its case. As discussed above Debtor in Possession did not timely file an opposition to the motion to dismiss. It is a party's responsibility to respond to pleadings. Merely taking some action, and tasking the court to review the docket in each case, determine what opposition the debtor in that case may or may not have to the motion, create an opposition for that debtor, place that opposition on the record for that debtor, advocate and then consider the opposition to the motion created by the court for that debtor, and then rule on the opposition created and advocated for that debtor by the court is improper.

The court notes that on February 7, 2012, more than two months after denying confirmation of the prior plan, the Debtor in Possession filed an amended plan and motion to confirm.

The Motion to Confirm states with particularity the following grounds upon which he relies for the court to confirm the amended plan:

- A. Debtor provides his legal conclusion that "his Amended Chapter 12 Plan satisfies the requirements of 11 U.S.C. § 1222 and 1225 and all other applicable rules of law.
- B. "Wherefore, Debtor prays that: 1. His Amended Chapter 12 Plan be confirmed, and 2. He is provided such other and further relief as the Court deems to be just and proper."

Motion, Dckt. 88.

The court reviewed with Counsel and the Debtor in Possession in detail the necessity of stating with particularity the grounds upon which relief is requested in a motion. See Civil Minutes Dckt. 78. At the prior hearing the court noted Debtor in Possession's continued failure to comply with basic pleading standards and provide sufficient information in the motion to confirm.

On March 6, 2013 Debtor in Possession filed an amended motion to confirm stating grounds with particularity to address the pleading defects noted by the court with regard to the initial motion to confirm.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed its opposition as Exhibit A to the motion for leave to file late opposition. Dckt. 112. The Opposition was then never filed.

The Opposition may never have been filed because the Debtor believed it so simple. Debtor, in a four sentence opposition, states that the Trustee's motion to dismiss was based on Debtor's failure to file a plan. Debtor states that he filed a plan on February 7, 2013 as well as a motion to confirm set for hearing on April 18, 2013. Therefore, because the Debtor file a Plan, he asserts that the Motion to Dismiss should be denied.

DISCUSSION

The court continued the hearing on the motion to dismiss to be heard with the pending motion to confirm.

7.	<u>12-91736</u> -E-12 ANTONIO GOMES TOG-12 Thomas O. Gillis	CONTINUED AMENDED MOTION TO CONFIRM CHAPTER 12 PLAN 3-6-13 [<u>105</u>]
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CONT. FROM 8-22-13, 6-13-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 12 Trustee, all creditors, and Office of the United States Trustee on March 6, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

No Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule o Bankruptcy Procedure 2002(b).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Debtor seeks confirmation of his Chapter 12 Plan. Creditor Movin' Hay, Inc. objects to confirmation.

Service

Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the

Office of the United States Attorney, unless a different address is specified:

**LOCAL RULE 2002-1
Notice Requirements**

(a) Listing the United States as a Creditor; Notice to the United States. When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

For Cases filed in the Sacramento Division:

United States Attorney
(For [insert name of agency])
501 I Street, Suite 10-100
Sacramento, CA 95814

For Cases filed in the Modesto and Fresno Divisions:

United States Attorney
(For [insert name of agency])
2500 Tulare Street, Suite 4401
Fresno, CA 93721-1318

. . .

(c) Notice to the Internal Revenue Service. In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

- (1) United States Department of Justice
Civil Trial Section, Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a)
above; and,
- (3) Internal Revenue Service at the addresses specified
on the roster of governmental agencies maintained by
the Clerk.

The proof of service lists only the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service
PO BOX 21126
Philadelphia PA 19114

Dckt. 107. The proof of service states that the addresses used for service are the preferred addresses for the Internal Revenue Service specified in a Notice of Address filed by that governmental entity.

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

Pleading with Particularity

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Debtor moves the court for an Order confirming his Chapter 12 plan filed on February 7, 2013;
- B. A copy of the plan is attached hereto and incorporated herein by reference;
- C. The Motion is made pursuant to the provisions of 11 U.S.C. §§ 1224, 1225, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of California; and
- D. A copy of the plan has been served on Debtor, all creditors, the Chapter 12 Trustee, the US Trustee and parties requesting special notice.

The Motion to Confirm does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief (confirmation) is based. The motion merely states that the court has authority to approve the plan, states that the plan is attached and has been served, and what code sections the Motion is made pursuant to. This is not sufficient to establish the right to confirmation of the plan.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A

complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

CREDITOR MOVIN' HAY, INC.'S OPPOSITION

Creditor Movin' Hay, Inc. opposes confirmation on the following grounds:

- a. The plan provides for disparate treatment of similarly situated creditors. Creditor states that the plan provides for payment to Creditor in Class 2.9 at an interest rate of 4%. Creditor states that the plan provides for payment to Seterus Servicing at a rate of 4.25% even though Seterus is in a more secure position since Seterus holds a first priority deed of trust. Creditor states that the plan does not set forth any logical basis for differentiating between the interest rate among secured creditors. Creditor states that some of the more secured creditors are receiving a higher interest rate than some of the less secured creditors.
- b. The expenses and payments exceed the projected income set forth on Exhibit B. See docket number 92. Creditor states that the subtotal for payments by Debtor through the Trustee are incorrect since payments to various classes of creditors actually totals \$5,173.44 and not \$4,436 as stated on Exhibit B. Creditor states the Class 2.3 payment is incorrectly stated in Exhibit B as \$555.28 and should instead be \$390.28 as stated in the Amended Chapter 12 Plan. Creditors states that the payments are actually \$137.44 more than the amount

set forth on Exhibit B. Creditor states that Debtor in Possession does not have sufficient reserve funds to cover expenses.

CONTINUANCE

On April 15, 2013 the Debtor filed a motion to continue the hearing to resolve the objection of Creditor. On April 16, 2013 the court granted the motion and continued the hearing to June 13, 2013. Nothing had been filed before the hearing. The court continued the hearing again to allow Debtor-in-Possession to file and serve supplemental pleadings in support of this motion on or before July 12, 2013. Debtor was to commence making plan payments in the amount of \$3,946.00 to the Chapter 12 Trustee commencing with June 2013 and each month thereafter until further order of the court, confirmation of the plan, conversion of the case or dismissal of the case.

DEBTOR'S SUPPLEMENTAL PLEADINGS

Debtor filed supplemental dairy profit and loss statements, prepared by Debtors-in-Possession CPA, Hillberg and Company in Turlock, California. Debtor-in-Possession also provided a current profit and loss statement with future projections of profit and loss. Debtors filed a proof of service that these were served on July 31, 2013.

MOVIN' HAY, INC.'S SUPPLEMENTAL OBJECTION

Creditor Movin' Hay, Inc. objects, stating that neither counsel nor Creditor were served with Debtor's supplemental documents and they discovered on August 7, 2013 that the documents had been filed and it has not had enough time to analyze the exhibits to determine the feasibility of the projected cash flow in comparison with the historical data provided.

Counsel for Creditor asserts that Debtor failed to file a supplemental pleading as required by the court, as none were served on counsel. Counsel states he was not served with Debtor's Ex Parte Motion for an order enlarging time to file supplemental exhibits either and was not aware of the extension.

A.L. GILBERT COMPANY'S OPPOSITION

A.L. Gilbert Company filed an objection stating that he checked the docket on July 29, 2013 at 2:12 and did not see any supplemental pleadings filed by the Debtor. Counsel asserts that neither he nor his client were ever served with any supplemental pleadings by the Debtor, or were served with the ex parte motion for enlarging time to file supplemental exhibits.

Creditor A.L. Gilbert Company states its has not had sufficient time to analyze the supplemental pleadings filed by Debtor. Creditor also states that Debtor has not made all of the required monthly payments to the Chapter 12 Trustee pursuant to the Court's order.

FURTHER CONTINUANCE

Both objecting creditors assert that they were not served with the Debtors-in-Possession supplemental pleadings filed with the court on July 29, 2013. The amended proof of service filed on July 31, 2013 provides a list of creditors served, which includes both Movin' Hay, Inc. and A.L. Gilbert Company and their respective counsel. Dckt. 170. It does appear peculiar that both creditors appear not to have received the supplemental exhibits.

Based on the foregoing, the court continued the hearing on the Motion to Confirm to September 5, 2013, to allow the parties in interest to review the supplemental data provided by the Debtor-in-Possession in support of confirmation. If there is any further opposition, it should be served and filed by August 30, 2013.

Movin' Hay, Inc. Supplemental Opposition

The August 30, 2013 Supplemental Opposition filed by Movin' Hay, Inc. asserts (1) the dairy cows are not well nourished and are underweight, (2) the feed supply is inadequate for the dairy herd, and (3) the Debtor cannot meet his income projections due to the condition of the dairy herd. The declaration of Richard Van Vliet is filed in opposition to the motion to confirm. Dckt. 187. He provides his opinion that based on an August 29, 2013 inspection, the dairy herd is underweight and not sufficiently nourished. Based on the condition of the herd, the Debtor cannot meet the income projections necessary for the plan to succeed.